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No. 577

In the Supreme Court of the United States

OCTOBER TERM, 1962

FRANCES D. PEARMAN, PETITIONER

v.

ANTHONY J. CELEBREZZE, SECRETARY OF HEALTH EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL STATEMENT AND REPLY MEMORANDUM OF PETITIONER

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PETITIONER'S EXPERIENCE, TRAINING AND WORK SKILLS:

REPORT OF CONTACT, 12/31/57, EXHIBIT 2, TR. 64:

"2. *Daily Activities*—Wage earner cannot stoop or squat at all. Her right arm is stiff at the elbow, and she is unable to get her hand to her head or face. She was right-handed; is trying to use her left hand as she cannot close her fingers on her right hand.

"She does most of the cooking for herself and her husband. She also does housework except heavy cleaning. She can do no hard work or ironing or other jobs which require lifting of heavy objects.

"3. *Work Experience*—For about ten years prior to her last job she worked in shirt manufacturing plants teaching various operations to new employees. She said she would fill in wherever needed and did a variety of jobs including checking shipments to see that all orders were properly filled and on time.

"The last three years she worked for Riegel Textile, she cut samples and forwarded them to the sales room in New York for use by the salesmen.

"All of her jobs were inside the plants. All required her to be on her feet constantly. She usually worked eight hours a day six days a week with some overtime at various seasons. She said she received a Christmas bonus following her accident in May, but no services were performed after the accident."

REPORT OF CONTACT, 11/29/60, EXHIBIT 9, TR. 78:

"We would also like to call attention to the fact at the present time, due to arthritic condition in her hands, she is not able to close the fingers on her right hand sufficiently to grip anything. We also noticed as she left the interview desk she walks rather stiff-legged and now limps somewhat."

EVIDENCE OF PETITIONER'S IMPAIRMENTS: TR. 36:

"Q. What type of work did you do prior to the accident?

"A. I cut samples for Reigel Textile put-up.

"Q. Have you been able to do any of that kind of work since the accident?

"A. No.

"Q. You have visited the Vocational Rehabilitation several times; is that true; over in my building, where they tried to get you a job?

"A. No.

"Q. Can you keep your balance when you walk? Do you have trouble?

"A. If I stumble I can't catch myself. I have fallen several times, and would mess up this bad arm. I don't have an elbow, and I don't have skin enough to fix back again.

"Q. You do have trouble keeping your balance?

"A. I stumble.

"Q. If there was an impairment in the street, you would have trouble?

"A. Yes, I can't catch myself.

"Q. Do you know of any occupation or work you could do with a reasonable amount of certainty that you would not injure yourself?

"A. No. I don't know what it would be.

"Q. Isn't it true that even some of the small things you do make you fall?

"A. That's the reason I have to have a colored woman to do the heavy work.

"Q. You have actually fallen some doing that type work?

"A. Yes, in the yard, I have fallen several times.

"Q. I believe you can drive a car for a short distance?

"A. If it is power operated.

"Q. You have just driven for a short distance?

"A. Yes. My leg tired. I have never tried to drive any distance.

"Q. Have you driven in crowded traffic conditions?

"A. I have driven to Greenwood and back, and to Honea Path and back, places like that.

TR. 52–53:

"Q. The medical evidence seems to agree, as far as all the doctors whose reports have been submitted here, and I don't think there is any doubt about the impairments you have. The only question before me is whether or not those impairments are of sufficient severity to prevent any gainful work. Have you consulted the Vocational Rehabilitation Department of the State of South Carolina, to try to get some other job or get training for another job?

"A. No. I can't use a pencil, can't use scissors, and I figure there was no use, no point in it.

"Q. You have a pretty good general education, you are a high school graduate. I was wondering if you had ever considered doing clerical work, or whether you could do some clerical work.

"A. I can't use a pencil any length of time. My fingers cramp. I can hold a pencil, but can't use it.

"Q. Have you tried to teach yourself to use your left hand?

"A. No. I have tried it different times; I have tried it, but I can't write lefthanded.

"Q. You don't think there is any kind of work you could do to earn money?

"A. I haven't been able to think of anything I could do at all.

EVIDENCE OF PETITIONER'S HUSBAND:

TR. 53:

"Q. You help her a great deal around the house?

"A. Yes, it puts me through pretty well.

"Q. Isn't it dangerous for her to work because of her unbalance?

"A. Yes. She has fallen two or three times, and I had to take her to the doctor and have her arm sewed up. She can't protect herself with that arm, and and she would fall every time on her arm. The stiff leg, she knocks it on almost anything that sticks up, and it keeps me afraid about her falling and getting hurt.

"Q. That's one reason you changed jobs?

"A. Yes."

THE CLAIMANT'S ATTENDING PHYSICIAN SAW HER ONCE MONTHLY FOR OVER THREE YEARS AFTER THE INJURY. THE LAST TIME HE SAW HER 9/6/55, HE ADVISED HER NOT TO WORK. Tr. 67, Exhibit #3.

AUTHORITIES CITED BY THE DEFENDANT IN OPPOSITION TO THE GRANTING OF THE WRIT

1) Grindstaff v. Flemming, 188 Fed. Sup. 44 (W.D. N.C.). Lung condition was claimant's major impairment. Examining physicians reported pulmonary reserve had not been reduced to such a degree as to preclude substantial gainful activity. Claimant's examining physician advised the claimant not to work in dusty occupations, and that his impairment did not preclude employment in other occupations.

2) Sampson v. Flemming, 189 Fed. Sup. 725 (D. Kansas). Claimant refused two jobs which were offered him that examining physicians reported he was able to do.

3) Wareheim v. Ribicoff, 194 Fed. Sup. 533 (D. Md.). Physical impairment relied upon was a heart ailment which had been classified by examining phy-

sicians as Class II, which denotes a slight limitation of physical activity under the American Heart Association Classification.

4) Drumiski v. Ribicoff, 194 Fed. Sup. 798 (D. Alaska). The evidence was that of a single examining physician who expressed the opinion that the claimant was totally and permanently disabled. The same examining physician stated that: "He found no evidence of any heart disease", and that "there is nothing about the cardiovascular system that would prevent his working."

5) Brady v. Ribicoff, 195 Fed. Sup. 35 (D.C. Md.). The physical impairment upon which the claimant's social security disability insurance benefits was determined thirteen months after the claimant's insurance status had expired. There was no evidence that he had any disability as of the date of the expiration of his insurance coverage.

6) Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474-497. In this case, the Court construed Section 10(e) of the National Labor Relation Act, as amended by the Taft-Hartley Act (29 U.S.C.A., Sec. 160(e) and the Administrative Procedure Act 5 U.S.C.A. 1009(e), which requires a reviewing court to set aside administrative action unsupported by substantial evidence, and in making such determination, to review the whole record, and held that under those statutes, the Court should take into account whatever in the record fairly detracts from the weight of evidence, and that the Court is precluded from sustaining an order merely on the basis of evidence which in and of itself justifies it without taking into account contradictory evidence, or evidence from which conflicting inferences could be drawn", and further considered that:

"Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

7) Adams v. Flemming, 276 Fed. 2d. 901. The plaintiff, a comparatively young man, was manager of the Marine Service Department and Inland Claims. His salary was $9,000.00 a year, with twenty-four employees under his supervision. His employer reluctantly arranged for his retirement upon the claimant's judgment as to his physical condition. In support of his claim, he submitted his affidavit outlining his medical history since 1946, with medical reports. The medical reports which he submitted indicated that treatment could control and eleviate his complaint, which was a sinus condition. None of the doctors stated that he was unable to engage in any gainful substantial activity. Plaintiff, himself, had every opportunity to testify as to how his sinus condition adversely affected his ability to do any work. He did not do so, but relied on documents and reports, and did not introduce any evidence along the lines mentioned in the reports.

ARGUMENT AND AUTHORITIES

It is apparent from the opinion of the Circuit Court, that the Court inserted two conditions and held that they were in effect precedent to the claimant's entitlement to social security disability insurance benefits, namely: (a) Consultation with former employer, and (b) Rehabilitation Officers and held that it was incumbent upon the petitioner to comply with those conditions to sustain her burden of proof under 42 U.S.C.A., Section 416(i) (1) (a) and Section 423 (c) (2) of the Act.

The Act is not susceptible of that construction by its expressed terms or by implication. Such a construction is contrary to all of the decisions of the Fourth Circuit. Prior to the decision in the instant case, the case of Underwood v. Ribicoff, 4th Circuit, 298 Fed. 2d 850, the same Court had followed the decisions of Circuit Courts generally and determined and so held that there are four elements of proof to be considered in making a finding:

> "There are four elements of proof to be considered in making a finding of Claimant's ability or inability to engage in any substantial gainful activity. These are: (1) the objective medical facts, which are the clinical findings of treating or examining physicians divorced from their expert judgments or opinion as to the significance of these clinical findings, (2) the diagnoses, and expert medical opinions of the treating and examining physicians on subsidiary questions of fact, (3) the subjective evidence of pain and disability testified to by Claimant, and corroborated by his wife and his neighbors, (4) Claimant's educational background, work history, and present age."

The Court commented: "Looking at what Congress has done, we do not think that it would have been willing to adopt the Secretary's suggestion if it had been advanced; at all events it has not done so. Even if the question were more doubtful than it appears to us, we should be in duty bound to give the Act a liberal construction. We would not be free to tailor the Act, even if we found the proposed restriction logically attractive."

In Ferran, 293 Fed. 2d, 568, 5th Cir., the Court commented in part: "The design (of the Act) is, by a comprehensive contributory insurance plan, to avert the personal hazards and the social problems which often, but happily not always attend old age."

Chief Judge Wyche, D.C. S.C., June 22, 1962, in Foster v. Ribicoff, 200 F. S. 99, a case similar to the instant case, reviewed principles of law and fact involved, which are substantially the same as in the instant case. His review is the following.

> Each and every claimant under the Social Security Act is entitled to have his or her case considered in the light of the individual, particular facts and circumstances surrounding such a claim. The very wording of Section 223 of the Social Security Act, 42 U.S.C.A. § 423, makes the point most strongly that each case and each person must be considered individually. That section sets forth that "every individual" who meets the requirements and is under a disability shall be entitled to a disability insurance benefit. The act is concerned not with a standard man of ordinary and customary abilities, but with the particular person who may claim its benefits and the effect of the impairment upon that person, with whatever abilities or inabilities he has. Thus, if a medically determinable physical impairment exists, the court should consider whether such impairment prevents the particular plaintiff from engaging in any substantial gainful activity for which he is qualified, and to that end may consider his education, training, and experience, as well as the nature and extent of the impairment itself.
>
> Nowhere does there appear in the act any reference to a requirement of "total disability". The official interpretation of this phrase as presented to Congress by representatives of the Department of Health, Education and Welfare, does not support the position taken by the defendant in this case. The Social Security Administration, in an effort to answer some of Senator Byrd's questions, submitted a statement setting forth their stand on the disability freeze provisions. See Page 43 of the hearings. Therein the Department acknowledged that the concept of "substantial gainful activity" is a growing one which must be treated in each instance

on the facts. The Department states on Page 43 of the hearings: "Substantial gainful activity means the performance of substantial services with reasonable regularity in some competitive employment or self-employment. It relates to the range of activities the individual can perform * * * complete helplessness is not necessary to a finding of an allowable disability. Sporadic or infrequent activity would not necessarily establish ability to engage in substantial gainful activity."

The phrases "inability to perform any substantial gainful activity" and "total disability" are not synonymous.

In the determination of this case, the controlling questions are: (1) what can plaintiff do; and (2) what employment opportunities are there for a woman who can do only what plaintiff can do? Abstract speculation by the Appeals Council as to a possibility of employment is not evidence which a claimant should have to refute; if it were, disability could never exist.

To summarize, the courts have generally agreed that the test of a claimant's disability or inability to engage in any substantial gainful activity is a subjective one, that is, what is reasonably possible in the light of the plaintiff's physical and mental capacities and his education, training, and experience. It is not necessary that the plaintiff establish the complete absence of any opportunity for substantial gainful employment; he need only establish that he has become disabled from employment in any work or vocation in which he could profitably seek employment in the light of his physical and mental capacities and his education, training, and experience. Furthermore, it is clear that a plaintiff need not be totally helpless or bedridden in order to be considered disabled under the Social Security Act. Dunn v. Folsom, D.C.Ark., 166 F.Supp. 44, 48; Adams v. Flemming, D.C.Vt., 173 F. Supp. 873; Aaron v. Fleming, D.C. Ala., 168 F.Supp. 291; Hall

v. Flemming, 6 Cir., 1961, 289 F.2d 290; Kerner v. Flemming, 2 Cir., 283 F.2d 916; Hier v. Ribicoff, D.C.Ill. 1961, 194 F.Supp. 22; Randall v. Flemming, D.C.Mich. 1961, 192 F.Supp. 111; Snelling v. Ribicoff, D.C.E.D.S.C., 198 F.Supp. 432 (1961); Corbin v. Ribicoff, D.C.W.D.S.C., 204 F. Supp. 65 (1962); Butler v. Flemming, (CA 5) 288 F.2d 591 (1961); Underwood v. Ribicoff (CA4) 298 F.2d 850 (1962); Klimaszewski v. Flemming, (D.C.E.D.Pa.1959) 176 F.Supp. 927; Ribicoff v. Hughes, 295 F.2d 833 (CA 8, 1961); Kohrs v. Flemming, 272 F.2d 731 (CA 8, 1959); Roberson v. Ribicoff, (CA 6) 299 F.2d 761 (1962); King v. Flemming, 289 F.2d 808 (CA 6, 1961); Teeter v. Flemming, 270 F.2d 871 (CA 7, 1959); Pruitt v. Flemming, 182 F.Sup.159,S.D.W. Va.; Pollak v. Ribicoff, 300 Fed. 2d, 674.

In conclusion, we desire to specifically call the Court's attention to the following facts:

1) There is no dispute in the evidence in this case.

2) This petitioner's attending physician, who had seen her every month for a period of more than three years after her injury, advised her not to work in a report to the defendant dated January 13, 1958.

3) Before the hearing in this case, her former employer, who had offered her employment after the injury and who did not know about her physical impairments, had gone out of business.

Respectfully submitted,
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